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The implementation of applicable legislation principle of the Regulation 1408/71

1. Introduction

Social security schemes in countries belonging to the European Union (EU) or to the European Economic Area (EEA) are co-ordinated by Council Regulations (EEC) Nos. 1408/71 and 574/72. The aim of the regulations is to protect the acquired social security rights of those moving within the European Union and European Economic Area. The Regulations do not harmonise the different Member State's schemes. Instead, Regulation (EEC) No. 1408/71 contains detailed rules which co-ordinate rights granted under the different national legislations (e.g. by requiring one State to take into account contributions paid in another) while Regulation (EEC) No. 574/72 contains detailed rules for implementing Regulation No. 1408/71.

The legal sources of social security coordination in primary legislation are Articles 42, 63 and 308 of the EC Treaty, and Article 39 on the free movement of workers. The Regulations based on Article 51 of the EC Treaty have but a limited objective in that they do not seek to harmonise but only to co-ordinate the national social security systems. Neither the Council nor the Court of Justice has ever given a definition of "co-ordination".

There are three preconditions of the social security co-ordination: a) free movement of workers (later persons); b) social security legislation belongs to the MS national legislation (territorial principle) and c) prohibition of discrimination based on nationality.

a) The co-ordination of the social security schemes is a necessary complementary to the principle of the free movement of persons. It enables workers, self-employed persons, pensioners, students and other categories of persons to effectively exercise their rights to move and reside freely within the European Economic Area. Therefore, nationals from Iceland, Liechtenstein, Norway are also covered by way of the European Economic Area (EEA) Agreement and Switzerland by the EU-Swiss Agreement.[1]

[1] http://www.europarl.europa.eu/facts/4_8_4_en.htm

b) The Regulations pursue only a limited objective and in no way affect the freedom of Member States to determine the rules of their own social security systems. That means that the Member States are, in principle, completely free to decide who should be insured, which benefits should be granted and under what conditions, how many contributions should be paid, how benefits should be calculated and for how long they should be granted. The Regulations therefore do not affect the distinctive features of the various national social security schemes. However, it is the objective of the Regulation to promote the free movement of workers by protecting those concerned from the harmful consequences which might result from the exclusive application of national law. In general, national social security legislation does not sufficiently take into account the specific situation of people who have worked or resided in another State, because it organises the national social security schemes according to national objectives. According to the principle of territoriality, the Member States use territorial elements in defining the scope of their social security schemes and in determining the qualifying conditions and the conditions of the payment of benefits. The Community Regulations aim to rectify the effects of this "principle of territoriality" on migrant workers and the members of their families. Article 51 of the EC Treaty therefore requires the creation of Community legislation in order to guarantee, in particular, not only the aggregation for the purpose of requiring and retaining the right to benefit (and of calculating the amount of benefit) of all periods taken into account under the laws of the various Member States but also the payment of benefits to persons resident in the Community. Thus the purpose of the Community Regulations on social security has been overruled, at least partially, by the application of the "principle of territoriality" by the Member States.

In order to prevent different national criteria leading to conflicts of law in situations where people have crossed the internal borders of the Union (negative conflict: the workers would not be insured in any Member State; positive conflict: workers would be insured simultaneously in two or more Member States) Regulation 1408/71 contains the uniform criteria for the determination of the legislation applicable, the lex loci laboris. It means the legislation of the State where the employed or self-employed person works, irrespective of his place of residence, was adopted as the general rule.

c) One of the pillars of the EC Treaty is the fundamental principle that all discrimination on grounds of nationality is prohibited. Article 3 of Regulation 1408/71 provides that persons residing in the territory of one of the Member States to whom the provisions of the Regulation apply are subject to the same obligations and enjoy the same benefits under its legislation as nationals of that State. This principle of equality of treatment has been given a broad interpretation in the case-law of the European Court of Justice, prohibiting not only overt (direct) discrimination based on all nationality but also covert (indirect) forms of

discrimination which, by applying other distinguishing criteria, in fact achieve the same result.[2]

2. Brief history of EU social security coordination

The Treaty of Rome, which founded the European Economic Community, set out certain objectives and established Community Institutions necessary to attain them. One of these objectives is the free movement of workers. To achieve this, it is necessary to adopt social security measures which prevent EU citizens working and residing in a Member State other than their own from losing some or all of their social security rights. Article 51 of the Treaty provides for the adoption of social security measures necessary to realise this objective. The first such measure, Regulation No. 3, providing rights for employed migrant workers, pensioners and their dependants, was adopted by the Community in 1958. In 1971, this was replaced by the wider-ranging Regulation No. 1408/71, which has since been progressively amended and updated. The Regulation now covers employed and self-employed persons and members of their families. It does not cover the non-active i.e. those who have never worked and are not already covered as a member of the family of an employed or self-employed person.

Since 1971 Regulation 1408/71 has been amended on numerous occasions in order to take into account developments at Community level, changes in legislation at national level and the case law of the Court of Justice. As the regulation was a complex and rather impractical piece of legislation, the Commission presented a proposal for a fundamental reform of the whole legislative system at the end of 1998 (COM(98)0779).

3. Future developments of the Regulations 1408/71

Based on the Commission's proposal, the European Parliament and the Council approved Regulation 883/2004 of 29 April 2004 in order to replace the Regulation (EEC) No 1408/71. The aim of the new regulation is to simplify the existing Community rules for the coordination of the Member States' social security systems by strengthening cooperation between social security institutions and improving the methods of data exchange between social security institutions. The obligation on administrations to cooperate with one another in social security matters should be improved and the movement from one Member State to another, whether for professional or private purposes, without any loss of social security entitlements will be facilitated.

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[2] http://209.85.129.104/search?q=cache:0EFa1hbLZVoJ:www.special-network.org/artreports/upload/Boek%2520website/Opening%2520Speech%2520III.doc+territorial+principle+in+social+security+coordination&hl=hu&gl=hu&ct=clnk&cd=11

However, the new rules on coordination in Regulation (EC) No 883/2004 cannot be applied until the corresponding implementing regulation has been adopted to replace Implementing Regulation (EEC) No 574/72.

The proposal to revise the Implementing Regulation has been tabled by the Commission in January 2006 (COM(2006) 16) and is in the process of first reading in the European Parliament and the Council.

The proposal completes the modernisation work done by Regulation (EC) No 883/2004 and is intended to clarify the rights and obligations of the various stakeholders as it defines the necessary measures for the persons covered to travel, stay or reside in another Member State without losing their social security entitlements. The proposal contains general principles to allow the coordination to function. These principles include single applicable legislation, assimilation of the facts, and equal treatment. Member States are required to comply with these but have exclusive competence in defining, organising and financing their national social security systems

The following elements will be covered by Regulation 883/2004 and its implementing regulation.

a) Improvement of the rights of insured persons by the extension of coverage in respect of persons and scope in respect of social security areas covered: The population covered by the Regulation will include all nationals of Member States who are covered by the social security legislation of a Member State. Hence not only employees, self-employed, civil servants, students and pensioners but also persons who are not part of the active population will be protected by the coordination rules. That simplifies and clarifies the rules determining the legislation applicable in cross-border situations;

b) expansion of the fields of social security subject to the coordination system in order to include pre-retirement legislation: The material coverage of the Regulation is extended to statutory pre-retirement schemes, which means that the beneficiaries of such schemes will be guaranteed payment of their benefits, will be covered for medical care and will be entitled to draw family benefits even when they are resident in another Member State;

c) amendment of certain provisions relating to unemployment: retention for a certain period (three months which can be extended up to a maximum of six months) of the right to receive unemployment benefit by persons moving to another Member State in order to seek employment;

d) strengthening of the general principle of equal treatment;

e) strengthening of the principle of exportability of benefits: Insured persons temporarily staying in another Member State will be entitled to health care which may prove medically necessary during their stay;

f) introduction of the principle of good administration: obligation on the institutions of Member States to cooperate with one another and provide mutual assistance for the benefit of citizens.[3]

4. General principles

The aim of the regulations is to protect the social security cover, including health care, of those covered by the Regulation when they move around the European Economic Area. The Regulations are based on four main principles to achieve that goal:

1. Discrimination on grounds of nationality.
2. The „aggregation" principle.
3. The „export" principle.
4. The „applicable legislation" principle or prevention of overlapping of benefits.

Among the above mentioned principle only the „applicable legislation" will be discussed further.

4.1. Prevention of overlapping of benefits

A) Basic rule: lex loci laboris. In international EC-employment relationships, EC Regulation 1408/71 (hereafter: "EC Regulation") appoints the applicable social security system in case an employee is performing activities in the territory of a Member State of the European Economic Area. Applicability of the EC Regulation is in general restricted to employees who were or are covered by the social security legislation of one or more Member States.

A person is subject at any given time to the legislation of one Member State only (the „applicable legislation" principle). This means that if a person stops working in one Member State in order to start working in another Member State, he/she will become subject to the legislation of the 'new country' of employment. Consequently, he/she will stop building up rights in the 'old country' and start acquiring then in the 'new country', regardless of his/her residence is in the 'new country' of employment. Workers are normally subject to the legislation of the State in which they are working, regardless of their place of residence or the location of any employer (principle of lex loci laboris).[4]

The legislation to which a person is subject is applicable both for the levy of contributions and for the payment of benefit. The purpose of having one legislation applicable is to avoid conflicts of law which could arise from the application of the different criteria for coverage under the national social security schemes.

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[3] http://www.europarl.europa.eu/facts/4_8_4_en.htm

[4] Art. 13, paragraph 1, under a EC 1408-71

This principle is intended to prevent anyone obtaining undue advantages from the right to freedom of movement. Contributing to social security systems in two or more Member States during the same period of insurance does not confer the right to several benefits of the same kind.[5]

B) Exceptional rules. There are a number of exceptions to this rule, the best known of which relates to the posting of workers abroad.

a) Employment in more than one Member State. There are several sub-groups of this kind of transborder employment and/or self-employment. The main cases are as follows:

- The *employee* exercises activities in several Member States, but exercises an activity partly on the territory of the State of residence. The applicable legislation is the legislation of the State of residence.
- The *employee* exercises activities for several employers having their seat or are domiciled in several Member States. The applicable legislation is the legislation of the State of residence.
- The *employee* exercises an activity in various Member States, excluding the State of residence (employee does not reside in any of the States of employment). The applicable legislation is the legislation of the State where the employer has its registered office.
- The self-employed worker exercises activities in several Member States and his/her activity is partly exercised on the territory of the State of residence; the applicable legislation will be the legislation of the State of residence.
- The migrant person simultaneously exercises salaried and self-employed activities on the territory of several Member States; the applicable legislation is the legislation of the country where the salaried activity is carried out.

b) Posting or secondment. Special arrangements exist to provide for employees temporarily posted by their employer to work in another Member State. In confirmation of the fact that during the period of assignment the social security system of the first Member State remains applicable, a certificate of applicable social security legislation (E-101) can be obtained from the competent social security agency of the first Member State. If the anticipated duration of the posting does not exceed 12 months and the employee is not replacing someone whose tour of duty has ended, the worker may remain insured in their "home" State's scheme. If the work unexpectedly lasts longer than 12 months, the employee may remain under the first State's scheme for a further 12 months.[6] A request to this extent should be filed with the competent social security agency of the Member State in which the employment is carried out.[7]

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[5] http://www.europarl.europa.eu/facts/4_8_4_en.htm

[6] http://www.msp.gov.mt/services/subpages/content.asp?id=1627#link%203

[7] art. 14, paragraph 1, under b EC 1408-71

c) Rule of the flag. A person employed on board a vessel flying the flag of a Member State is subject to the legislation of that State.

d) Civil servants are subject to the legislation of the Member State to which the administration employing them is subject;

e) A worker called up or recalled for *service in the armed forces or for civilian service* of a Member State retains the status of worker and is subject to the legislation of that State;

f) *Retired persons* are subject to the laws of the Member State in which they reside[8]

Determination of the applicable legislation

	Briefing	**Description**	**Applicable scheme (legislation)**
Basic approach			
General rule		Employee works only in one MS. (Other than his/her State of origin)	Legislation of the Member State on the territory on which the activity (salaried or non-salaried) is exercised (lex loci laboris)
Exceptions			
Most frequent exceptions	1. Exercise of activities in several Member States	*Employee:* Exercise of an activity partly on the territory of the State of residence	Legislation of the State of residence
		Employee: Exercise of activities for several employers having their seat or domiciled in several Member States	Legislation of the State of residence
		Employee: Exercise of an activity in various Member States, excluding the State of residence	Legislation of the State where the employer has its registered office

[8] http://europa.eu/scadplus/leg/en/cha/c10516.htm

		Self-employed workers: If the activity is partly exercised on the territory of the State of residence	Legislation of the State of residence
		Self-employed workers: In other cases	Legislation of the State in which the main activity is exercised
		Simultaneous exercise of salaried and self-employed activities on the territory of several Member States	– Legislation of the country where the salaried activity is carried out – If the salaried activities are carried out in several Member States, determination of one legislation
	2. Posting/secondment	Concept of secondment – Exercise of the professional activity on the territory of another Member State than that where the activity is usually carried out – Maintain a link of subordination with the original employer – Limited duration (12 months + prolongation of 12 months) – Possible prolongation up to 5 years	Employee remains under the social security scheme of the Member State where the activity is usually carried out
	3. Transport sector		In principle, legislation of the country in which the employer has its seat
	4. Rule of the flag	A person employed on board a vessel flying	The flag of a MS.
	5. Civil servants		The MS to which the administration employing them is subject
	6. Service in the armed forces or for civilian service		The status of worker and is subject to the legislation of that State.
	7. Retired persons	Both active and passive migrant retired persons	The Member State in which they reside

Source: Author's own source.

Applicable legislation in the practice of Member States[9]

Rules which designate the national legislation which is applicable to a person are an essential part of social security coordination. As it was mentioned above, in principle, the law of the place of work (*lex loci laboris*) regulates all aspects of social security legislation. As a general rule therefore, a person will only be insured in one Member State for any one period, will only have to pay contributions to the competent institution of one Member State, and insurance from one period will only give entitlement to benefits of the same kind in one Member State (i.e. insurance from one period cannot be used to obtain entitlement to benefits of the same kind in two or even more Member States). Thus double payment of benefits is prevented because migrant workers should not obtain additional benefits as a result of using the right to freedom of movement. There are some difficulties to understand and apply the „one legislation applicable" principle in the everyday practice of the Member States. We would like to highlight the most frequent and significant cases.

A practical problem determining the applicable legislation was encountered with regard to the internal organisation of certain Member States. E.g. in *France* there is a patchwork of 'caisses primaries', all of them giving out E-forms with sometimes very different control policies and interpretations and no centralised responsible institution can be contacted. This causes different practical problems for the Belgian administration.[10]

In *Austria* e.g. a question is raised concerning the principle of only one applicable legislation, referring to *Kinderbetreuungsgeld* whose recipients are covered by health insurance. The Austrian authorities regard health insurance as a kind of annex granted to the recipients of this *KBGG*. This implies that if there is an entitlement to a similar family benefit under the legislation of another Member State, this Member State is also responsible for granting sickness benefits. Austrian health insurance provisions therefore currently seem to be applied only to recipients of benefits under *KBGG* who are not covered by health insurance in the other Member State (because of their employment or status as a member of a family). This 'subsidiarity' may be considered quite plausible from the Austrian point of view, but the situation obviously does not meet the demands of the Regulation, if the authorities competent for sickness benefits in the other Member State consider their provisions to be applicable only in a subsidiary manner as well.[11]

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[9] This part of the article based entirely on the trESS European Report 2006 written by Yves Jorens and József Hajdú.

[10] Training and Reporting on European Social Security, French National Report 2006 by Jean Philippe Lhernould, 2006

[11] Training and Reporting on European Social Security, Austria National Report 2006 by Walter J. Pfeil, 2006

In *Lithuania*, some problems with applicable legislation arise when it is not clear if a person concerned is employed or not. This happens in the case of child care benefit. The mother (or father) of the child who takes child care leave, according to Lithuanian legislation, remains formally in a labour relationship (employed), but does not perform work (and does not receive any wage). If the father (or mother) of the child works in another Member State, the legislation of that State should be applicable. But that State may argue that a child stays with her mother (or father) in Lithuania, where she (he) formally remains in a labour relationship, so Lithuanian legislation should be applicable. It could, however, be asked if such a person could not be considered as still exercising a gainful activity by the European Court of Justice.[12]

When interpreting the norms of applicable legislation, an interesting question occurs, whether or not persons must be personally engaged in business. For example, a person has registered business activity in *Poland* and in *Austria*. This person resides in Poland (has a family, house etc.) but spends the majority of his or her time in Austria. His or her business in Poland is run by employees, the owner visits the company in Poland on the monthly basis. Can it be said that in this case the Polish legislation is applicable on the basis of Article 14a.2 of Regulation 1408/71?[13] A similar issue is raised in *Greece* concerning the scope of article 14a (2): is physical mobility of the person normally carrying out activities as a self-employed (social security criterion) in more than one Member State a prerequisite for the application of Article 14a(2)? The issue arises where e.g. a person exercises an activity as a self-employed in the UK and, at the same time, the person, as partner of an undertaking in Greece and who never moved to Greece is deemed as self-employed under Greek social security legislation. The *UK* reiterated that such a person falls under Article 13(2)(b) (one activity in the UK – the latter being the unique legislation applicable). Thus, a more general question could be raised: does this situation fall under the scope of free movement of persons or free movement of capital? It would be interesting to further clarify the scope of Regulation 1408/71 also from that perspective, because it would solve many questions – simplification of procedures, arising in practice with the extended parallel self-employed activity in more then one Member States of "non mobile" persons.[14]

An interesting case could be found in *Finland*. The Insurance Court was asked whether a person residing in Germany and employed there could be insured in Finland on the basis of employment in Finland as she did not fulfil the conditions for insurance under the German legislation. The Insurance court stated that the Regulation determines which national legislation is applicable. From that point of

[12] Training and Reporting on European Social Security, Lithuanian National Report 2006 by Teodoras Medaiskis, 2006

[13] Training and Reporting on European Social Security, Polish National Report 2006 by Gertruda Uscinska, 2006

[14] Training and Reporting on European Social Security, Greek National Report 2006 by Konstantinos Kremalis, 2006

view, the fact that the person could not be insured under the national legislation was not relevant when applying the Regulation. The Finnish social security legislation could not therefore be applied to a person who resided in Germany and was employed there.

Another problem concerns Finnish tour guides who work for Swedish tour operators in different (mostly Mediterranean) Member States. Difficulties in this area are mainly caused by the fact that the employer and the employee are of different nationality and the work is carried out in a third country where the employee does not reside. While they work abroad their 'centre of interests' and their family are normally still in their country of origin. Questions arise as to which country should ensure that the employer fulfils his or her social security duties. If it is presumed that the individual should always contact the local authorities and claim social security coverage in the country of employment, this would lead to an awkward situation for the individual as the guide works in that country only for a few months. The employers have also claimed that it is impossible to pay the contributions to a country where they do not have a registered office. Even though they have tried to pay them, they argue that the authorities of the country of employment have stated that paying contributions is only possible when there is a registered office or equivalent located in the country of employment. Employers are not willing to contribute to the home country of the employee in application of Article 17 of the Regulation. Consequently, when returning to Finland, they have a 'vagabond' status and sometimes, although being 'people working within the EU', are still without coverage.

In Finland, there has also been a change in the national interpretation of legislation applicable after a person has stopped working in Finland and resides in or moves to another Member State. This change has been a result of the changes in the Finnish employment pension law during sickness and maternity cash benefit periods. A person who has been covered under Finnish legislation because of employment and who falls ill or has a baby and therefore is in receipt of sickness or maternity cash benefits from Finland, and who resides in or moves to another Member State, is considered to be an employed person and Finnish legislation is applicable in the meaning of Article 13.2.a during the cash benefit period. This applies of course to all persons who have been under Finnish legislation. This situation frequently occurs in the case of frontier workers, seamen and also posted workers who stay in the country of residence. This means that family benefits are paid from Finland during this period according to Article 73 and Finland is responsible for the health care costs of these persons and their family members. The application of the Finnish legislation ceases when the payment of the sickness or maternity cash benefits ends. Previously the application of Finnish legislation was considered to end when the person in question actually stopped working. The sickness and maternity cash benefit was exported according to Article 22. But the

person was not considered to be under Finnish legislation within the meaning of Article 73 and for the responsibility of health care costs.[15]

The *Slovak Republic* does not have a public document which would provide for actions taken when defining the State of domicile (the centre of interests), especially in relation to the citizens of Slovakia who have decided to live in another Member State while they retain their permanent residence in the territory of the Slovak Republic, for example, at their parents' permanent residence. As Member States, in which such persons permanently live and have their centre of interests, do not have a reason to contact institutions in the country of permanent residence, duplicity may be witnessed when nobody informs of the facts which would otherwise give rise to a change or termination of the claim.[16]

In many other circumstances, different provisions of the Regulations may apply or the correct provision that should be applied could not be determined.

Fundamental problems remain with respect to the question as to which legislation applies to persons who have ceased all activities, the post-active workers.

Whether or not the law of a Member State continues to apply to a worker who no longer has a professional activity in that Member State but who continues to receive a long-term social security allowance from that State while residing in the territory of another Member State, is to be determined by national law. The Court of Justice has ruled that Regulation 1408/71 does not itself define the conditions in which the legislation of a Member State ceases to be applicable.

According to the National Social Insurance Board in *Sweden*, a person residing in Sweden can be considered as normally working in Sweden as long as he maintains a connection to the Swedish labour market while working in another country. The rules concerning post protection in the Social Security Act may provide guidance in this regard. A person can thus be considered as normally working in Sweden up to three months after the work has ceased. A person who receives a work-based benefit, may also be regarded as normally working in Sweden.[17]

In the *Netherlands* a lot of attention is paid to this problem. It is stated that after 30 years of Regulation the totality of the picture has become a real patchwork. Moreover, the differences between the social security systems and the different interests of post-active persons make the concept even more difficult.

E.g. (1) a Dutch pre-pensioner prefers to be AOW-insured in the Netherlands when he lives in Belgium and worked in the Netherlands, but when he receives a

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[15] Training and Reporting on European Social Security, Finnish National Report 2006 by Maija Sakslin, 2006

[16] Training and Reporting on European Social Security, Slovakia National Report 2006 by Iveta Radicova, 2006

[17] Training and Reporting on European Social Security, Swedish National Report 2006 by Ann Numhauser-Hennig, 2006

high private pension, he would prefer to fall under the Belgian system to avoid the payment of high premiums in the Netherlands.

E.g. (2) for a Belgian pre-retired person it is almost impossible to live in the Netherlands, as under the Dutch residence scheme, he would pay 30 % of his pre-retirement pension to the AOW.

Article 13, 2f of Regulation 1408/71 states that when one stops to be subject to the legislation of his/her MS of employment, he/she is subject to the legislation of his/her MS of residence. According to Article 10 of Regulation 574/72, the MS of employment determines the date of termination and is responsible to notify the MS of residence of the person. So, strange enough, the former MS of employment can decide when the legislation of another MS (of residence) becomes applicable.

Until 1999, post-active workers were covered by Dutch national insurance schemes after working in the Netherlands even when they resided in another Member State, provided they received a disability benefit above a certain minimum level (35 per cent of the gross statutory minimum wages). This rule was repealed. From now on, persons claiming a Dutch disability benefit, who can invoke, with the help of the Regulation's rules, benefits in kind on the basis of the Ziekenfondswet (Dutch health insurance act), are still insured for the law on general insurance against special medical expenses (AWBZ – algemene wet bijzondere ziektekosten), which is a national insurance, but they are no longer insured for the general law on old age benefits (aow – algemene ouderdomswet) and the general law on survivors' benefits (anw – algemene nabestaandenwet).[18]

In the Torres case of 11 July 2003 the concerned person (Spanish civil servant in the Netherlands who was paid by the Spanish Ministry) had an active employment relation (as his employer was still paying him), even where he had not worked since years and was not intending to do so in the future. Article 13, 2d was considered to be applicable in the case and Torres could not be regarded as a post-active person. So the Dutch authorities could not levy premiums in the Torres case. This had an impact on the WAO/WIA benefit receivers abroad whose employment relation was not yet terminated (e.g. wage still paid on top of the WAO, according to a Collective Agreement) and resulted in the combination of the Dutch WAO and the foreign WW. According to the Torres-case, these people are not post-active persons abroad and they stay insured in the Netherlands. This can generate the following problem. When a person receives a partial WAO and he applies for an unemployment benefit in Belgium, Belgium will say the person has no reintegration possibilities in the Netherlands, will give him unemployment benefits and will ask social security contributions. But, according to the Torres-case, the Netherlands will say this person still has an employment relation and will levy premiums on that basis.[19]

[18] Training and Reporting on European Social Security, Dutch National Report 2006 by Frans Pennings, 2006

[19] Training and Reporting on European Social Security, Spanish National Report 2006 by Christina Sánchez-Rodas Navarro, 2006

One cannot, however, oblige post-active persons to stay post-active. This also poses specific problems as made clear in the Netherlands. E.g. if a Belgian pre-retired person engages in some activities in the Netherlands, the Netherlands will levy premiums on it. If a Dutch pre-retired person does the same in Germany and he/she stays below a certain percentage, he/she is not insured under the unemployment scheme anymore and he/she has no right at all when he/she falls sick. Thirdly, when an unemployed person lives in the Netherlands and works in Germany, he/she is not insured in Germany and the Dutch legislation is not applicable anymore. When he/she gets sick in Germany, he/she has no right either. This is the reoccurring problem of people not declaring to the Dutch authorities that they work in another country and the fact that the Netherlands does not have a sound approach with regard to the question where someone is insured. 883/2004 will bring a fairly broad solution, aiming at clarity. Concluding, it was reminded that the ageing of the population, the ongoing debate on reintegration on the labour market and the need for people to work longer will point out the need for new rules. 883/2004 is not adapted to this situation, as the proposal was already 10 years old, when the idea of working longer had not yet surfaced. Finally it was stated that retired people are sometimes given the advice not to engage in activities abroad as this causes too much problems. This makes that the Regulation itself can sometimes be considered as an impediment to the free movement of workers.[20]

In its recent case *Van Pommeren-Bourgondiën* (Case C-227/03, 7 July 2005) the Court ruled that the residence requirement set by a legislator as a condition for continuing to qualify for compulsory insurance in respect of some branch of social security is compatible with Article 39 of the EC treaty, only if the conditions relating to voluntary insurance for non-residents are not less favourable than the conditions relating to compulsory insurance for the same branches of social security which residents obtain.

The effect of this case law is that optional insurance must become more attractive for the post-active persons who are excluded from some compulsory schemes.

A new voluntary insurance was established without discrimination in comparison with the insurance for residents. But some first problems have already risen in the framework of this new insurance scheme, such as the situation of the pre-retired persons as benefit-receivers (pre-retirement not under Regulation 1408/71, who are also included as they are legally insured in the *Netherlands* according to Article 4), the fact whether the person should have been "working" lastly in the Netherlands brings up the question what to do if the person was lastly "insured" in the Netherlands, like in the case of a person receiving Anw who moves to another MS.

Concerning the application of Article 15 on voluntary insurance, the question was raised whether a person, who lives in a Member State and is self-employed in

[20] Training and Reporting on European Social Security, Dutch National Report 2006 by Frans Pennings, 2006

another Member State, has a right of option when the legislation of the latter Member State only provides for voluntary sickness insurance and when the person meets all the conditions in order to be insured in the former Member State.

In Belgium it has to be stated that as a result of the Unanimity rule, a lot of practicians are rather vague wich leads to diverging interpretations.

A typical example can be found concerning the application of Article 14(2), b, i of Regulation 1408/71, in cases where a worker performs professional activities in at least two Member States, one of which is the State where he/she resides. The Court of Justice has ruled that even a rather limited activity of twice two hours per week in the State of residence has to be taken into account for the application of Article 14 (2) b, i. In contrast, the Court has also ruled that insignificant professional activities have to be disregarded. Consequently, it is not always clear if additional, insignificant or occasional activities performed in the State of residence have to be considered when determining the applicable law.[21]

While *Belgium* e.g. requests that someone who resides in Belgium and works in another State should, at least, work one day a month in Belgium to be subject to its legislation, the Netherlands only requests one day every quarter. Much stricter is the Czech Republic, which requires one day a week.

An additional problem is that the fact that such marginal activities, leading to a change in applicable legislation, involves a lot of extra administrative work for the main employer and the person concerned.

This problem also arises in the case of a person who receives benefit and starts to undertake very minor activities in another Member State. He/she may lose the insurance coverage of the State in which he/she receives benefit and may not actually be insured in the new State because of the marginality of the new job. A typical example can be found in *Denmark* and in particular e.g. people living in the border region between Sweden and DK. A person is covered by the MS where he resides. Living in Sweden and working in DK is the typical situation in which a lot of "home offices" in Sweden occur. This way, people working for a Danish employer work ½ day at their home office and the rest of the week in DK, so the Swedish legislation is applicable as they live in Sweden and the lower Swedish contributions are paid. Danish employers are in need of labour and they often employ temporary workers from Sweden who are sometimes also working in Sweden. More and more people are working in different Nordic countries. But Danish employers are not satisfied with the outcome of the application of the rules of the Regulation. They would like to continue paying the Danish contributions and avoid the application of the coordination rules. But the Danish social security agency wants to be there for the migrant workers and not for the employers. In

[21] Training and Reporting on European Social Security, Belgian National Report 2006 by Herman van Hoogenbemt, 2006

stable employment situations, the agency is willing to make some deals, but not for temporary employment.[22]

The *Dutch and Belgian* authorities agreed to solve these problems by concluding Article 17 Agreements, in particular when persons work in certain marginal jobs, such as the voluntary fire brigade or voluntary army or are members of the Municipality council, so that persons who have their main activity in Belgium continue to fall under the Belgian social security system.

Brief evaluation

These rules were actually conceived for the traditional migrant worker, who is, however, more and more a phenomenon of the past. Typically, these 'guest workers' were blue collar workers, moving from a poorer to a more prosperous Member State in which they worked and lived for a long time. Upon retirement, they would often return to their country of origin, thus 'taking home' the higher pension/living standard of the State of employment. From a normative point of view, this State of employment principle seems to be the most appropriate, as the person worked and contributed to this higher level all his or her active life. This situation can moreover be considered effective in the light of the achievement of the aim of enhancing the free movement of workers. This category of migrant workers might be due for revival as workers from the newly acceded formerly communist countries might still come to do unattractive work in the 'old' Member States.

For flexible workers in a more precarious position, however, the *lex loci laboris* principle has its weaknesses. They are more likely to become dependent on basic pension schemes and other minimum living standard benefits, raising difficulties in terms of exportability (*cf.* the special non-contributory benefits and social assistance).

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HAJDÚ JÓZSEF

AZ ALKALMAZANDÓ JOG KIVÁLASZTÁSÁNAK SZABÁLYAI AZ 1408/71/EGK RENDELETBEN

(Összefoglalás)

A szociális biztonság koordinációjának célja, hogy biztosítsa az EU tagállamokban az állampolgárok és családtagjaik részére a szociális ellátások bizonyos formáinak igénybevételét más tagállamokban. A tagállamokban az ellátások fajtái, jogosultsági feltételei és mértéke eltérő, azt a tagállamok maguk határozzák meg. A koordináció mindössze a tagállami szociális rendszerek között teremt kapcsolatot, mégpedig úgy, hogy meghatározza, milyen feltételek mellett és milyen eljárások betartásával kell más tagállam állampolgárai részére szociális ellátásokat nyújtani. A szabályozások pontosan behatárolják, hogy az állampolgárok mely köre jogosult a juttatásokra, illetve hogy milyen szociális juttatásokat kell a koordináció alá tartozónak tekinteni.

Az Európai Unió jogi alapját képező, az Európai Közösségeket létrehozó Szerződés 42. Cikkében (a régi 51. Cikk) rendelkezik a szociális biztonsági rendszerek koordinációjáról.

A szociális biztonsági rendszerek tagállamok közötti koordinációja az 1408/71/EGK és az 574/72/EGK rendeletek alapján történik, melyek hazánk uniós

csatlakozásának napjával (2004. május 1.) Magyarországon is kötelezően alkalmazandó jogszabályokká váltak. Mindkét szabályozás rendelet, tehát közvetlen alkalmazása a tagállamokra nézve kötelező, és elsőbbséget élveznek a belső joggal szemben. A rendeletek négy alapvető fontosságú alapelven nyugszik: a) Egy ország jogrendszerének alkalmazása, b) Azonos elbírálás, c) Szerzett jogok megtartása és d) Biztosítási idők összeszámítása. Ezen alapelvek közül a tanulmány az elsővel (egy állam joghatóságának elve – applicable legislation) foglalkozik részletesen. Bemutatja a koordinációs rendelet vonatkozó cikkelyeit és azok érvényesülését a tagállamok gyakorlatában.

A koordinációs rendelet jogválasztásra vonatkozó általános szabálya: a munkavégzés helyének a joga (lex loci laboris). Emellett számos speciális szabályt (kivételt) is tartalmaz.

A rendelet *általános szabálya* értelmében a munkavállalóra annak az országnak a jogszabályai vonatkoznak – abban az országban biztosított – amelynek területén a munkát végzi (13. cikk).

Ez a gyakorlatban azt jelenti, hogy a munkavállaló, illetve önálló vállalkozó a munkavégzés helye szerinti országban a munkavégzés megkezdésétől biztosított lesz és a járulékokat is ebben az államban kell fizetni. Ez abban az esetben is így van, ha a munkáltató székhelye/telephelye egy másik tagállam területén található.

Amennyiben egy másik tagállamban székhellyel rendelkező munkáltató olyan munkavállalót – akinek állandó lakóhelye valamely EGT tagállam területén található – Magyarországon foglalkoztat, a magyar szabályok szerint válik biztosítottá és utána munkáltatója a magyar biztosítottakra irányadó mértékű járulékot fizet. Ilyen esetben a Magyarországon foglalkoztatott munkavállaló a bejelentési kötelezettség és járulékfizetés tekintetében úgy jár el, mintha a munkáltató képviselője volna.

A Rendelet főszabálya értelmében egy személy egyszerre csak az EGT egy tagállamában lehet biztosított, akkor is, ha egyidejűleg több tagállamban több munkavégzésre irányuló jogviszony keretében foglalkoztatják. E szabály alól csak olyan, speciális esetekben lehet kivételt megállapítani, amikor az adott személy valamely tagállamban a köztisztviselők különleges társadalombiztosítási rendszerébe tartozik.

Az általános szabályok alól azonban a Rendelet több kivételt is megállapít. A kivételek az alábbiak:

a) a munkaadó által a másik ország területére munka végzésére kiküldött dolgozók (a külföldi kiküldetést teljesítő köztisztviselők is);
b) a tengeri hajók, repülőgépek személyzete;
c) a külképviseletek tagjai és alkalmazottai.

A migráns munkavállalók szociális biztonságáról szóló 1408/71/EGK rendelet (a Rendelet) II. címe rögzíti azokat az általános és különös szabályokat, amelyek alapján meghatározható, hogy egy, tevékenységét részben vagy egészben az Európai Gazdasági Térség különböző tagállamaiban végző munkavállaló/egyéni

vállalkozó esetében mely tagállam jogszabályait kell alkalmazni a biztosítási kötelezettség elbírálására.

A cikk első részében a 1408/71/EGK rendelet alapelvei közül az alkalmazandó jog alapelvére vonatkozó általános és kivételes szabályokat mutatjuk be. A második részben az Európai Uniós trESS project (trESS: training and researching on European Social Security) keretében végzett kutatás eredményein alapulva mutatjuk be az egyes tagállamokban jelentkező – az alkalmazandó jog alapelvéhez kapcsolódó – legfontosabb problémákat.